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ABBREVIATIONS USED IN THIS PETITION

(App. . . .), when used with arabic numerals, refers to Appendix to Petition for Certiorari filed by Day-Glo Color Corp. et al. in number 871 of the October term, 1970, and pagination to that appendix.

(App. . . .), when used with roman numerals, refers to the appendix following this petition, and pagination to that appendix.

(MR. . . .) refers to the Report of the Special Master underlying the judgment sought to be reviewed and pagination to that report.

APPENDIX

Statutes Involved i

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In the Supreme Court
of the
United States

October Term, 1970

No.

HARRY P. LOCKLIN and ELMER J. BRANT, general partners doing business under the firm name of Radiant Color Company,

Petitioners,

vs.

DAY-GLO COLOR CORP. (formerly Switzer Brothers, Inc.), ROGER C. SWITZER and JOSEPH L. SWITZER,

Respondents.

PETITION FOR THE WRIT OF CERTIORARI
to the United States Court of Appeals
for the Seventh Circuit

Most respectfully, petitioners pray that the writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on June 26, 1970.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals, reproduced App. 1-22, is reported in 429 F.2d 873, 166 U.S.P.Q. 164, and 1970 Trade Cases ¶ 73,241. The opinion of the District Court, reproduced App. 25-30, is reported in 1969 Trade Cases ¶ 72,705.

JURISDICTION

The judgment of the Court of Appeals was entered on June 26, 1970 (App. 23). Respondents' petition for rehearing was denied on September 15, 1970 (App. 24). Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The questions here presented are the same as those presented to the Court of Appeals, to-wit:

1. Where the dollar measure of damages is based upon profits which have been lost and expenses which have been incurred in past years, is an award of damages based upon that measure alone sufficient if the damage award fails to make allowance for the reduced purchasing value of the dollar which has taken place between the accrual of the damages and their liquidation?

2. From what date should an award of damages based upon a master's report bear interest?

STATUTES INVOLVED

This petition involves 15 U.S.C. 15; 28 U.S.C. 1961; 35 U.S.C. 284; R.S. 966; and R.S. 4921 (reproduced in full, App. i-ii).

STATEMENT OF THE CASE

In an action for treble damages arising from a violation of the anti-trust laws, the damage issues were referred to a special master who found that the unlawful conduct of respondents resulted in lost sales upon which lost profits accrued during the damage period (MR 183-184) as tabulated below:

Year	Lost Sales	Lost Profits
1949	$ 40,000	$ 6,544
1950	258,400	41,344
1951	173,600	27,776
1952	295,000	47,200
1953	330,000	52,944
1954	339,200	54,288
1955	342,800	54,980
1956	184,400	29,504
Total	$1,963,400	$314,656

On the basis of that finding, the special master found that petitioners were damaged in the amount of $314,656, precisely the amount of the lost profits. These findings were adopted by the trial court and were affirmed on appeal.

Before the special master, petitioners urged that since the purchasing value of the dollar had been depreciating constantly from the date of accrual of damages to the date of their liquidation, the award should reflect that well known fact of life. The special master's findings denying an appropriate increase are short (MR 195-196 and 218) and are reproduced in full at App. iv and v.

Upon the presentation of the master's report to the District Court, petitioners raised the question of inflation a second time. The District Court found (App. 29):

> "Third, Radiant seeks an increase in the damage award to reflect the greater purchasing power of the dollar in the years injury was sustained. Such an

adjustment, however, is not proper. See *Bates v. United States*, 108 F.2d 407 (7th Cir. 1939). *Compare Deutsche Bank Filiale Nurnberg v. Humphrey*, 272 U.S. 517 (1926)."

On the appeal, petitioners asked for an adjustment a third time. The Court of Appeals said (App. 4-5):

"Radiant, on cross-appeal, raises two issues. First we are asked to decide that the judgment, expressed in dollars, is erroneous for lack of an upward adjustment equivalent to the inflationary shrinkage occurring since the 1950's, the time during which damage was actually sustained, until the entry of judgment.

"There are some cases where inflation was considered as a factor in assessing damages, see *e.g.*, *Waterman S.S. Corp. v. Dean*, 171 F.2d 408 (4th Cir. 1948), *cert. denied*, 337 U.S. 924 (1949) [salvage]; many cases where dollar value is simply ignored, see *e.g.*, *Bates v. United States*, 108 F.2d 407 (7th Cir. 1939), *cert. denied*, 309 U.S. 666 (1940) [tax refund suit]; and a host of cases where inflation is used to demonstrate why a trial court committed no error in refusing to order a remittitur when a damage award, compared to past cases, seems high, see *e.g.*, *Virginia Ry. v. Rose*, 267 F.2d 312 (4th Cir.), *cert. denied*, 361 U.S. 837 (1959) [personal injury]. We are unable, however, to find any authority requiring, or even allowing, the increase of a damage award, *once found*, to offset the decreased value of the dollar.

"Nor can Radiant successfully contend that the master erred in failing to consider inflation to arrive at the damage figure on the ground that this is customary in other types of 'tort' situations and that the lack of a consumer price index adjustment deprives it of property without due process of law. Both

of these arguments can be met with the single observation that Radiant's 1950 economic losses, awarded in 1960 dollars, were trebled.'"

"'It strikes us that Radiant is here asking for a favored position—an insured against inflation—devoid of attendant risk. As the master aptly noted: 'While we all agree [that today's dollar is not the same thing as yesterday's] none of us can say that tomorrow's dollar may not equal yesterday's—whatever the odds may be at the moment.'"

The foregoing is the complete record of the reasons advanced by the special master, the District Court and the Court of Appeals in refusing to adjust the lost profits in assessing damages. None of the authorities which are cited purports to decide the precise issue.

The other circumstance upon which this petition is based is the question of prejudgment interest on the damage award. That issue was stated by the Court of Appeals (App. 5-6) thusly:

"Radiant next asks that interest run, not only from the date of judgment, 13 March 1969, but also from the date the master's report was filed, 3 June 1968. Interest is not enumerated as a recoverable item in the statute, 15 U.S.C. § 15. Recovery of it is therefore precluded. *Cf. Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945).[8] Radiant is then relegated to the general interest statute, 28 U.S.C. § 1961, which allows interest on a money judgment only from its entry date. The judgment on cross appeal must be affirmed."

"[8]This is quite unlike the patent statute, 35 U.S.C. § 284, which provides for damages 'together with interest. . . .'"

Interest on $1,145,378.73 at the rate of 6% from June 3, 1968 to March 13, 1969 amounts to $53,451.00, an amount of sufficient significance to give substance to the issue.

REASONS FOR GRANTING THE WRIT

1. In refusing to make an adjustment of damages awarded for lost sales and profits adequate to compensate the victim of an antitrust violation for the loss in purchasing value of the dollar taking place from the time of the accrual of the damages to the date of their liquidation, the Court of Appeals has construed substantive federal law in such a way as to deprive the victim of the full benefit of the antitrust laws. No prior decision of this Court is available as controlling precedent on this issue. Thus, the Court of Appeals has decided an important question of federal law which has not been, but should be, decided by this Court [Rule 19, Section 1(b)].

The reluctance to draw upon that "common experience" which "attests that the value of the dollar has been subject to consistent depreciation" (*Virginian Railway Company v. Rose*, 4th Cir. 1959, 267 F.2d 312, 316) because "We are unable, however, to find any authority requiring, or even allowing, the increase of a damage award, *once found*, to offset the decreased value of the dollar." (App. 5) underscores the tendency of lower courts to draw limiting lines well within the general teachings of prior decisions. Only swift surgical action by this Court can remove the negative effect which the decision below is bound to impart to the orderly application of general damage rules to damage awards in antitrust cases.

The refusal of the Court of Appeals to adjust the actual damage award to compensate petitioners for today's value of the profits lost during the damage period cannot be excused by "the single observation that Radiant's 1950 economic losses, awarded in 1960 dollars, were

trebled". If the public policy requiring the grant of treble damages in antitrust cases is to be given full effect, the single damage portion of the award must itself be adequate compensation for the actual damages suffered. The trebling of the damages should not be used as a shelter to excuse a patent inadequacy of the single damage assessment.

2. In refusing to award prejudgment interest accruing from the filing of the master's report to the date of entry of judgment, the Court of Appeals has decided a second question of federal law upon which this Court has not directly spoken. Thus our second question, like our first question, presents a question of the character pointed out in Rule 19, Section 1(b).

By the very nature of things, the question of prejudgment interest is inherent in any case where antitrust damages are referred to a master, a practice approved in *LaBuy v. Howes Leather Co.* (1957), 352 U.S. 249, 259. Common as the question must be, there is a paucity of square authority. Apart from the decision here tendered for review, the only reported decision which counsel has been able to locate, and which purports to decide the precise issue, is *Trans World Airlines, Inc. v. Hughes* (SDNY 1969), 308 F. Supp. 679 at page 696, reconsideration denied in *Trans World Airlines, Inc. v. Hughes* (SDNY 1970), 312 F. Supp. 478, at page 485.

The refusal in the only reported antitrust decisions to award prejudgment interest on antitrust damages assessed by a special master should not stand as authority for the guidance of other courts. The reason for this is that the logic of the cases is plainly wrong. The proper rule in

antitrust cases should be the same as it is in other cases if the wronged party is to receive adequate compensation for the loss of use of what is rightfully his money, a right which becomes fixed as soon as the damages are liquidated. The true rule should be that used in patent damage awards and stated in *Crosby Valve Co. v. Safety Valve Co.* (1891), 141 U.S. 441, 457-458, where this Court, in a discussion reproduced in App. iii-iv, held that interest should be allowed from the date of filing the master's report.

The Court of Appeals, in its opinion, found a vital difference between the patent laws and the antitrust laws because the patent statute specificially includes interest as an item of damages and the antitrust statute does not (App. 6, footnote 8). While that observation is true, it should not affect the result. This, for the reason that R.S. 4921 in effect in 1891 when *Crosby Valve* was decided made no mention of interest. So far as interest is concerned, the patent statute which *Crosby Valve* construed is precisely like the antitrust statute in effect today.

Insofar as the Court of Appeals holds that 28 U.S.C. 1961 allows interest on a money judgment *only* from its entry date, there is a square conflict on this important question of federal law with *Louisiana & Arkansas Railway Co. v. Export Drum Co.* (5th Cir. 1966), 359 F.2d 311, at page 317:

> ". . . . It is settled, however, that § 1961 relates only to interest recoverable on a judgment itself. It has nothing to do with the question of whether prejudgment interest shall be allowed as part of the compensation awarded to make the injured party whole. (citations omitted)."

Indeed, 28 U.S.C. 1961 is the same as R.S. 966 in effect when *Crosby Valve* was decided. If R.S. 966 did not forbid prejudgment interest on a master's award in 1891, 28 U.S.C. 1961 should not forbid it today.

For the reasons stated, we submit most respectfully that the writ of certiorari should be granted so that this Court may speak on the latently recurrent and important legal questions presented by this petition. We submit further that on the merits of the questions, the judgment of the Court of Appeals should be modified (1) with instructions to adjust the single damages award to compensate petitioners for the decreased purchasing value of the dollar from the date of injury to the date of liquidation of damages, and (2) with further instructions to award interest from the date when the master's report was filed until the date of entry of judgment.

Respectfully submitted,

CARL HOPPE,

Attorney for Petitioners.

CHARLES L. MICHOD,

Of Counsel for Petitioners.

(Appendix Follows)

Appendix

STATUTES INVOLVED

15 U.S.C. 15:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

28 U.S.C. 1961:

"Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law."

35 U.S.C. 284:

"Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court.

When the damages are not found by a jury, the court shall assess them. In either event the court may increase the damages up to three times the amount found or assessed.

The court may receive expert testimony as an aid to the determination of damages or of what royalty would be reasonable under the circumstances."

Revised Statutes, Sec. 966 (18 Stat. 182):

"Sec. 966. Interest shall be allowed on all judgments in civil causes, recovered in a circuit or district court, and may be levied by the marshal under process of execution issued thereon, in all cases where, by the law of the State in which such court is held, interest may be levied under process of execution on judgments recovered in the courts of such State; and it shall be calculated from the date of the judgment, at such rate as is allowed by law on judgments recovered in the courts of such State."

Revised Statutes, Sec. 4921 (18 Stat. 960):

"Sec. 4921. The several courts vested with jurisdiction of cases arising under the patent laws shall have power to grant injunctions according to the course and principles of courts of equity, to prevent the violation of any right secured by patent, on such terms as the court may deem reasonable; and upon a decree being rendered in any such case for an infringement, the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby; and the court shall assess the same or cause the same to be assessed under its direction. And the court shall have the same power to increase such damages, in its discretion, as is given to increase the damages found by verdicts in actions in the nature of actions of trespass upon the case."

EXCERPT FROM CROSBY VALVE CO. v. SAFETY VALVE CO. (1891), 141 U.S. 441, 457-458

"The Circuit Court allowed interest on the $40,344.59 from the date of the filing of the master's report. The defendant assigns this as error, and contends that interest should have been allowed only from the date of the decree. In support of this view, the case of *Mowry v. Whitney*, 14 Wall. 620, 653, is cited. But we regard it as established by the cases of *Illinois Central Railroad v. Turrill*, 110 U.S. 301, 303, and *Tilghman v. Proctor*, 125 U.S. 136, 160, that the ruling as to interest made by the Circuit Court is proper. In the latter case, it is said: 'By a uniform current of decisions of this court, beginning thirty years ago, the profits allowed in equity, for the injury that a patentee has sustained by the infringement of his patent, have been considered as a measure of unliquidated damages, which, as a general rule, and in the absence of special circumstances, do not bear interest until after their amount has been judicially ascertained; and the provision introduced in the patent act of 1870, regulating the subject of profits and damages, made no mention of interest, and has not been understood to affect the rule as previously announced. (Citations omitted.) Nothing is shown to take this case out of the general rule. At the time of the infringement, the fundamental questions of the validity and extent of Tilghman's patent were in earnest controversy and of uncertain issue. Interest should therefore be allowed as in *Illinois Central Railroad v. Turrill*, just cited, only from the day when the master's report was submitted to the court (which appears, by the terms of his report and of the decree below, to have been October 7, 1884) upon the amount shown to be due by that report and the accompanying evidence.'

"Delay caused by the court, or not attributable to the plaintiff, in coming to a conclusion on the master's report, where the amount found by that report is confirmed, ought not to deprive the plaintiff of interest on the amount found by the master. Under such circumstances, the account ought to be considered as liquidated on the day when the master's report is filed. This is in analogy to the allowance of interest on the amount of the verdict of a jury from the date of the verdict to the date of the judgment, in accordance with the statutes of many States, and among others of Massachusetts. Pub. Stats. c. 171, § 8."

EXCERPTS FROM REPORT OF SPECIAL MASTER

His findings of fact 105 and 106 (MR 195-196) state:

"105. Radiant introduced evidence showing the decreased purchasing value of a dollar between the time the profits were lost and the date of the trial (A. 463; R. 1758; PX 48). It argues that while its expert witnesses did not testify in terms of a decreased dollar, the Master should take the dollar findings he has made based upon their testimony (as well as the other evidence) and add thereto 'the reduced purchasing value of the dollar which has occurred from the time of injury down to the date of trial' (R.R. Br. 84A) as 'Today's dollar and yesterday's dollar simply are not the same thing' (R. Br. 190). While we can all agree with the latter statement, none of us can say that tomorrow's dollar may not equal yesterday's,—whatever the odds may be at the moment.

"106. Radiant equates its argument to the practice in personal injury cases where juries have been instructed that, in fixing awards in personal injury cases, they might consider the decrease in the dollar's

value (R.R. Br. 84A). While an antitrust violation may be a 'tort', one does not recover treble damages and attorneys fees in a personal injury case, which makes the analogy rather inapposite. I have found the *dollars* I believe the evidence sustains *as testified to by the witnesses.* Those witnesses were speaking of *dollars* without regard to its purchasing value. I can read 'dollars' no differently (S. Br. 139; *Bates v. U. S.*, [CC7-1939], 108 F. 2d 407, 408; *Deutsche Bank, etc. v. Humphrey*, [1926] 272 U.S. 517, 519, *per Holmes J.*). Accordingly, I find that Radiant's award here for lost profits cannot be increased to reflect the decreased value of the dollar between the time the profits were lost and the date of the trial."

His conclusion of law V (MR 218) states:

"Counter-Plaintiffs are not entitled to have the Findings of Lost Profit (III[a] hereof) increased to reflect the decreased value of the dollar occurring between the time the profits were lost and the date of the trial."